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Supreme Court of the United States

OCTOBER TERM, 1940

No. 160

RICHARD SMITH, GERALDINE J. HALL,
Petitioners and Appellants Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MYRON G. EHRLICH,
CHARLES E. FORD,
JAMES K. HUGHES,
Counsel for Petitioners.

GIBSON BROTHERS, INC.

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OCTOBER TERM, 1940

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RICHARD SMITH, GERALDINE J. HALL,
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vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition of Richard Smith and Geraldine J. Hall respectfully shows:

I.

Summary Statement of the Matter Involved.

Petitioners, together with one Rattley, were jointly indicted, tried and convicted by a jury in the District Court of the United States for the District of Columbia for violating Title 6, sections 151 and 151-A of the Code of Laws of the District of Columbia, as amended, and for conspiring to violate the same.

The indictment was in twelve counts. Counts 1, 3, 5, 7

and 9 charged the petitioners with operating a lottery. Counts 2, 4, 6, 8 and 10 charged the petitioners on the same days with selling a lottery ticket; count 11 charged the petitioners with possessing lottery tickets on the last date; and count 12 charged the petitioners with conspiring to do these same things.

The petitioners were acquitted on counts 1, 2, 3, 4, 5, 6, 7 and 8; and were convicted on counts 9, 10, 11, and 12. Petitioner Smith was sentenced on counts 9 and 10 to six months to two years and six months, on count 11 to six months and on count 12 to four months to two years, all counts to run concurrently. Petitioner Hall was sentenced on counts 9 and 10 to four months to ten months, on count 11 to four months, and on count 12 to four months to ten months, all counts to run concurrently.

Upon the *voire dire* at the request of the Government the Trial Court inquired of the panel seated in the jury box whether any of them had played the numbers game within two years of that date. Six jurors who answered in the affirmative were summarily, without further questioning, excused for cause. Petitioners assigned as error this action on the ground that prejudices and opinions relative to the crime itself do not form the basis for challenge for cause if the juror is otherwise able to render a fair and impartial verdict based on the evidence, the Court making no effort to ascertain this. The Government exercised eight additional peremptory challenges and petitioners ten. The statute (Title 6, Sec. 366, D. C. Code 1929) allows each side but ten. Petitioners aver that the error of the Trial Court allowed the Government fourteen peremptory challenges which are more than permitted by statute. (R. 25)

The Government produced evidence showing that on a number of occasions Ned Best, a police officer, placed a numbers bet with the said Rattley; that on these days, but several hours later and a few blocks away the said Rattley was observed by Best approaching a parked automobile

operated by petitioner Hall. Sometimes he entered the auto and sometimes he did not. Sometimes he handed her a paper bag and sometimes he did not. The contents of the bags on any of these occasions could not be determined. There was no evidence of any other number plays except those made by the policeman Best. (R. 29-40)

On some of these occasions the police officer followed Hall to the Town Tavern at the Peace Cross in Maryland. On one of these occasions, December 27, 1938, he observed her give a package to a colored man who gave it to a white man in a third car, the contents of which bag were unknown. (R. 37)

Police Officer George C. Deyoe testified that he observed this occurrence and that petitioner Smith was the recipient of the package plus 2 or 3 more from the colored man. The contents of all of these packages were unknown. (R. 50)

He further testified that on January 6, 1939 he swore to identical warrants of arrest for all defendants at the office of the United States Commissioner; there being no evidence as to any further observations by him in the interim. (R. 50)

On January 7, 1939 he gave witness Best certain marked coins; later that day in company with other officers and Deputy Marshal Ward, who possessed the warrant of arrest for petitioner Smith, he observed Hall drive to the Town Tavern and hand a package, contents unknown, to an unidentified person who shortly thereafter delivered it to petitioner Smith. Smith was followed and while in the District stopped at a stop sign. At this time Deputy Marshal Ward executed the warrant of arrest, placed Smith in custody and took over his automobile and the contents thereof. (R. 52)

While in custody, en route to Police Headquarters, Smith threw certain paper slips out of the window which were recovered. At Police Headquarters money and a pad were taken from his person. Over the objection and exception of petitioners the witness further described papers

taken from Smith's person and automobile as numbers slips and books. (R. 52)

Petitioner Hall was subsequently arrested pursuant to the said warrant of arrest; but nothing was taken from her person or automobile. (Rattley was similarly arrested and in his possession was found the marked coins. They were only offered in evidence against Rattley, and not petitioners.) (R. 59)

Petitioners objected to all of the evidence relative to the numbers plays, the delivery of packages, the search of Smith, the admission in evidence of all papers taken from his person and automobile and the testimony of the officers that they were numbers slips and books. Petitioners, when the warrants of arrest were offered in evidence, objected and moved to quash them. The Trial Court, over the objection and exception of petitioners, also admitted in evidence the warrants of arrest. (R. 60, 78)

Petitioners objections were twofold: (1) The warrants of arrest were invalid on their face in that neither they nor the supporting affidavits set forth any facts showing probable cause, and (2) the evidence of the Government was *uncontroverted that there was an absence of probable cause and a resulting violation of the Fourth Amendment.* (The Warrants of Arrest and the Supporting Affidavits are set forth in full on page 100 of the record.) (R. 61-63)

The Trial Court refused to pass upon the legality of the arrest, search or seizure on the authority of *James Bennett* and *Eula Mae Bennett* v. *United States,* 70 App. D. C. 76, 104 Fed. (2) 209, stating that such decision precluded it from considering during the trial the legality of the seizure of the various exhibits, no motion to suppress having been previously filed; to which ruling an exception was duly noted. The Court stated that in the past its practice was to permit counsel to either file a motion to suppress or object to the evidence as they in their discretion determined. (R. 102, 105)

During the course of the trial the Government attempted to explain the presence, at the time of the arrest of petitioner Smith, of Alcohol Tax Unit Inspector Sweeney and asked the question of a police officer why Sweeney was there (at the time of the arrest). Witness responded that Sweeney's car was in better shape than the police car and was used because they knew by reputation that petitioner was a right fast driver. (R. 88)

Petitioner moved the Trial Court to withdraw a juror on the ground that the Government cannot put in issue the character, reputation and habits of a defendant, nor introduce evidence thereto until so done by the defendant. The Court denied such motion and an exception was duly noted. (R. 88)

The Trial Court charged the jury that the failure of petitioners to testify was because they were availing themselves of a Constitutional right not to do so. The Court emphasized the law as to explanations of possession of numbers slips when there were no such issues in the case, and further commented on the failure of a member of a conspiracy from testifying, all of which resulted in an unfair comment on the failure of petitioners to testify. (R. 123, 124, 131)

From the judgment of conviction and the sentence thereupon, petitioners appealed to the United States Court of Appeals for the District of Columbia, that Court affirming the rulings of the Trial Court.

On appeal, the United States Court of Appeals in its written opinion held that it made no difference whether the release of the jurors was for cause or favor, even though it was upon challenge of the Government, thereby holding that the Government could exercise fourteen peremptory challenges in violation of the Statute if the jury as finally constituted was a fair and impartial one. (Last paragraph, page 2 of written opinion.) (R. 139)

It was urged in the Court of Appeals that this Honorable

Court had held in the cases of *Agnello* v. *United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, and *Gouled* v. *United States,* 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, that where the evidence is uncontroverted that there is a violation of the Fourth Amendment the objection may be raised to the evidence without the filing of a prior motion to suppress.

It was also urged that since it had been the practice of the Trial Court prior to this trial to permit an objection to the evidence to be made for the first time, its action in changing its practice afforded petitioners no opportunity to raise the question prior to trial.

The Court of Appeals refused to recognize the principles of *Agnello* v. *United States supra* and *Gouled* v. *United States, supra,* and without regard to the existence of facts showing an uncontroverted violation of the Fourth Amendment, summarily holds without even a reference thereto, that an objection to the evidence comes too late after the trial is in progress, which is directly repugnant to the law this Honorable Court has set forth. (R. 139)

The Court of Appeals, with the mere comment that no such showing has been made passes over petitioners' contention that they were afforded no opportunity to file a motion to suppress prior to the trial. (R. 139)

The Court of Appeals considered without sufficient merit to discuss, or refer to, petitioners' contention that it was error to permit a Government witness to testify to petitioner Smith' reputation for fast driving prior to his putting his character or reputation in issue, and more particularly when fast driving was entirely extraneous to any of the issues.

The Court of Appeals further wrote that petitioners' Counsel objected to the Trial Court, without their request instructing the jury not to draw unfavorable inferences from petitioners' failure to testify. In justice to counsel nowhere in the entire record do counsel assign or urge such charge as error. (R. 140)

As aforesaid, counsel objected to the unfavorable and prejudicial comments of the Court relative to "explanations of possession" when such issues did not exist, comments on the failure of a member of a conspiracy to testify and the right of a defendant not to testify.

II.

Reasons Relied on for Allowance of Writ.

1. That the United States Court of Appeals for the District of Columbia has decided a question of general importance relating to the construction of Title 6, Section 366 (1929) of the Code of Laws for the District of Columbia which has not been, but should be, decided by this Court.

2. a. That the United States Court of Appeals for the District of Columbia refused to follow the law set forth by this Court in *Agnello* v. *United States, supra* and *Gouled* v. *United States, supra,* and thereupon refused to extend to petitioners the rights under the Fourth Amendment this Court has stated they are entitled to.

b. That said Court failed to recognize petitioners' contentions that they were deprived of an opportunity to file a Motion to Supress prior to trial.

3. That the United States Court of Appeals affirmed a violation of petitioner Smith's Constitutional rights in sanctioning an attack on his reputation by the Government prior to his putting the same in issue.

4. That the United States Court of Appeals affirmed a violation of petitioners' constitutional rights in sanctioning a prejudicial charge to the jury.

WHEREFORE, your petitioners pray that the Writ of Certiorari issue under the Seal of this Court, directed to the United States Court of Appeals for the District of Columbia directing said Court to certify and send to this Court a full and complete transcript of the record and the pro-

ceedings of said Court of Appeals had in the case numbered on its docket 7447, *Richard Smith, Geraldine J. Hall,* Appellants v. *United States of America,* Appellee, to the end that this cause may be reviewed and determined by this Court; and for such other and further relief as to this Court may seem proper.

June 17, 1940.

RICHARD SMITH,
GERALDINE J. HALL,

By MYRON G. EHRLICH,
CHARLES E. FORD,
JAMES K. HUGHES,
Council for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1940

No.

RICHARD SMITH, GERALDINE J. HALL,
Petitioners and Appellants Below,

against

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

There was no opinion rendered by the Trial Court relating to the petitioners. The opinion of the United States Court of Appeals for the District of Columbia (R. 137 to 141) rendered May 13, 1940, is still unreported.

II.

Jurisdiction.

A. The United States Court of Appeals for the District of Columbia made its order for mandate herein May 13, 1940. (R. 141)

B. The jurisdiction of this Court is invoked pursuant to provisions of Title 28, U. S. Code, Section 347, subdivision

"A", Section 240 (A) of the Judicial Code, as amended, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States.

C. The reasons stated in the preceding petition under II herewtih adopted and made a part of this brief, are believed to constitute good grounds for invoking the jurisdiction of this Court.

III.

Statement of the Case.

A statement of the case has been made in the preceding petition under I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

A. 1. The United States Court of Appeals for the District of Columbia erred by refusing to follow the decisions of this Court in that it refused to decide that where the facts are uncontroverted that there is a violation of the Fourth Amendment, a defendant may raise an objection to the evidence without having first filed a Motion to Suppress.

2. The United States Court of Appeals for the District of Columbia erred by failing to decide that petitioners were afforded no opportunity to raise the matter prior to trial.

B. The United States Court of Appeals for the District of Columbia erred in deciding that upon challenge of the Government the Trial Court could excuse for favor jurors in excess of the ten peremptory challenges permitted by statute if the jury as finally constituted was fair and impartial.

C. The United States Court of Appeals for the District of Columbia erred in not deciding that it was reversible error to permit an attack on the character, reputation and

habits of a defendant prior to his putting the same in issue.

D. The United States Court of Appeals for the District of Columbia erred in misconstruing petitioners objection to the Trial Court's charge to the jury and in not deciding that the Trial Court charged the jury erroneously and prejudicially on the question of petitioners failure to testify.

V.

Summary of Argument.

A. 1. The United States Court of Appeals for the District of Columbia decided that where no motion to suppress was filed prior to the trial an objection to the evidence after the trial is in progress comes too late and cannot be considered even where the ground is that the evidence is uncontroverted that no probable cause for the issuance of the warrant existed and that there is an uncontroverted violation of the Fourth Amendment. This ruling is in direct opposition to the decisions of this Court. The evidence herein was uncontroverted that there were no facts showing probable cause. The warrant of arrest was illegally issued.

2. The past policy of the Trial Court was to permit an attack on the legality of the seizure of evidence by way of objection whether a motion to suppress had been filed or not. For the first time, when objection was raised herein, it held it was precluded from considering the validity of the seizure. Petitioners were thereupon afforded no opportunity to file a motion prior to trial.

B. The United States Court of Appeals affirmed the action of the Trial Court in summarily excusing for cause, upon the request of the Government, six jurors who had played the numbers within two years, upon the apparent presumption that they were prejudiced against the numbers law and would not render a fair and impartial verdict. The Court of Appeals further held that even if excused

for favor, which resulted in fourteen peremptory challenges for the Government, there was no harm done if the jury as impanelled was fair and impartial. The statute only allows the Government ten peremptory challenges. Prejudices and opinions relative to the crime itself do not form the basis for challenge for cause if the juror is otherwise able to render a fair and impartial verdict based on the evidence, which the Court made no effort to ascertain.

C. The character, reputation and habits of a defendant can only be put in issue by the defendant himself, and a statement by a Government witness on direct examination that the defendant had a reputation for fast driving was prejudicial.

D. The Court charged that the failure of petitioners to testify was because they were availing themselves of a Constitutional right not to do so. That is not the law. A defendant in a criminal case has the privilege of requesting to testify which is provided for in an Act of Congress which removed a disability from so doing. The Trial Court emphasized explanations of possession when there were no such issues in the case and commented on the failure of a member of a conspiracy to testify, all of which resulted in an unfair comment on the failure of petitioners to testify. All of which was affirmed by the Court of Appeals.

VI.

ARGUMENT.

A.

1. The United States Court of Appeals for the District of Columbia erred by refusing to follow the decisions of this Court, in that it refused to decide that where the facts are uncontroverted that there is a violation of the Fourth Amendment a defendant may raise an objection

to the evidence without having first filed a Motion to Suppress.

For facility of presentation, the Argument hereunder will be presented as follows:

(a) Rulings of the lower Courts and preliminary statement.

(b) An objection to the evidence may be raised at the trial without prior motion where the evidence is uncontroverted that there is a violation of the Fourth Amendment.

(c) The evidence was uncontroverted that there were no facts known to arresting officer or applicant for the warrant to show probable cause, and resulted in an uncontroverted violation of the Fourth Amendment.

(d) The warrant of arrest was illegally issued and invalid.

(a).

Rulings of the Lower Courts and Preliminary Statement.

The ruling of the Trial Court is specifically set forth first on page 102 of the record where upon a renewal of petitioners' motions the following appears:

> "The Court overruled all the motions made on behalf of the three defendants *stating it did not find it necessary to pass on the validity of the arrest warrants,* since the case of *James Bennett and Eula Mae Bennett* v. *United States,* decided February 27, 1939, (67 W. L. R. 734, 736) in the United States Court of Appeals for the District of Columbia precluded it from considering during the trial the legality of the seizure of the various exhibits." (No motion to suppress having been filed.)

And again on page 105 of the Record the Court stated:

> "I make my ruling on the Bennett case."

The Court of Appeals in its written opinion, paragraph two of page two holds:

> "Appellant Smith first insists that the warrant of arrest was improperly issued and that the lottery papers obtained from his person and automobile should, therefore, have been excluded as evidence illegally obtained. The objection was not made until the trial was well under way, and we have recently held that, unless there is no opportunity to make the motion in advance of trial, the objection comes too late after the trial is in progress. *Bennett* v. *United States,* 70 App. D. C. 76, 104 Fed. (2) 209. . . ."

It is therefore clear that the merits of petitioners' objection have never been considered, both lower Courts refusing to do the same; and both lower Courts refusing to even comment on petitioners' specification of error herein.

To all the testimony as to the arrest of appellant, the search and seizure, and the admission of the seized evidence, petitioners duly objected; and when the warrants of arrest were offered in evidence petitioners moved the Court to quash it on the following grounds:

1. The affidavits failed to show probable cause.

2. The uncontroverted testimony of the Government itself clearly showed there was no probable cause on personal knowledge. (R. 62)

It is therefore also clear that petitioners' contention was clearly set forth in the Trial Court and presented to the Court of Appeals where, it will not be denied, petitioners in briefs and arguments vigorously urged it upon the Court.

(b).

An Objection to the Evidence May Be Raised at the Trial Without Prior Motion Where the Evidence Is Uncontroverted That There Is a Violation of the Fourth Amendment.

Direct authority for this contention are two specific decisions of this Honorable Court, that is, *Agnello* v. *United*

States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, and *Gouled* v. *United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, wherein this Court spoke on the identical proposition.

In the Agnello case on page 34 of 269 U. S., this Court said.

> "The Government contends that even if the search and seizure were unlawful, the evidence was admissible because no application on behalf of defendant was made to the court for the return of the can of cocaine. The reason for such application, when required, is that the court will not apuse in a criminal case to determine collateral issues as to how the evidence was obtained. See *Adams* v. *New York*, 192 U. S. 585, 594, affirming 176 N. Y. 351. *But in this case, the facts disclosing that the search and seizure violated the Fourth Amendment were not in controversy.* That is shown by the examination of the witness called to give the evidence. There was no search warrant; and from the first, the position of the Government has been that none was necessary. In substance Frank Agnello testified that he never had possession of the can of cocaine and never saw it until it was produced in court. There is nothing to show that in advance of its offer in evidence, he knew that the Government claimed it had searched his house and found cocaine there, or that the prosecutor intended to introduce evidence of any search or seizure. It would be unreasonable to hold that he was bound to apply for the return of an article which he maintained he never had. *Here, by uncontroverted facts it appears that a search and seizure was made in violation of the Fourth Amendment. There is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained may not invoke protection of the Fifth Amendment immediately and without any application for return of the thing seized.* A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. *Gouled* v. *United States*, 255 U. S. 298, 313." (Italics supplied.)

In the Gouled case on pages 312, 313 of 255 U. S., this Court said as follows:

> ". . . It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it *becomes probable* that there has been an unconstitutional seizure of papers, *it is the duty* of the Trial Court to entertain an objection to their admission as a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a Constitutional right.
>
> "In the case we are considering, the certificate shows that a motion to return the papers seized under the search warrants, was made before the trial and was denied, and that on the trial of this case before another judge, this ruling was treated as conclusive, *although as we have seen in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized.* The Constitutional objection having been renewed, under the circumstances the Court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant." (Italics supplied.)

The two leading cases on the subject are *Adams* v. *New York,* 192 U. S. 505, 24 S. Ct. 372, 48 L. Ed. 575 and *Weeks* v. *United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652. These established the basic rule that a Court will not pause in a criminal case to determine collateral issues as to how the evidence was obtained.

This basic principle was again affirmed in *Segurola* v. *United States,* 275 U. S. 106, 48 S. Ct. 77, 72 L. Ed. 186, with an exception enunciated that the rule does not apply where there has been no opportunity to present the matter in advance of trial.

But there is nothing in the Segurola case to imply that the exception mentioned therein is the "only" one; nor is there anything in the Segurola case to imply that this Court departed from the principles laid down in the Agnello and Gouled cases. On the contrary the language therein is consistent with them.

Bennett v. *United States, supra,* was founded on the authority of the Segurola case. The Trial Court and Court of Appeals predicated their ruling in this case on the Bennett case.

Insofar as there was nothing in the Segurola case, and hence in the Bennett case, overruling the doctrines of *Agnello* v. *United States* and *Gouled* v. *United States,* it was error to hold that petitioners' objection to the evidence on the ground that there was an uncontroverted violation of the Fourth Amendment could not be considered.

(c.)

The Evidence Was Uncontroverted That There Were No Facts Known to the Arresting Officer or Applicant for the Warrant to Show Probable Cause, and Resulted in an Uncontroverted Violation of the Fourth Amendment.

The record is uncontroverted that the Deputy Marshal executing the warrant of arrest was possessed of no facts at all.

As the arrest was made pursuant to the direction of Officer Deyoe, let us next consider what he knew.

The record is also uncontroverted that he made the only affidavit in support of the warrant of arrest.

It is uncontroverted by Deyoe himself that the *only* fact

known to him of personal knowledge was that on December 27, 1938 he observed the co-defendant Hall at Town Tavern Inn in Maryland, hand a white package to a colored man who in turn gave that package and one of two others to appellant who arrived a short time later. Thereafter on January 6, 1939 he went to the office of United States Commissioner Turnage and swore to the arrest warrants. (R. 50-51)

The contents of these packages were not known to Deyoe.

It hardly needs argument that these facts, which were the only ones known to Deyoe do not constitute probable cause that appellant was promoting a lottery, selling lottery tickets and possessing lottery tickets in the District of Columbia.

Insofar as Officer Deyoe was concerned there was nothing illegal in Hall's delivery of a paper package to appellant through the medium of a colored man, he having no knowledge whatsoever as to the contents.

It is therefore obvious and not in controversy that there were no facts known to Deyoe to constitute probable cause, and therefore no controversy that there was a violation of the Fourth Amendment. (*Agnello* v. *United States, supra.*)

The Court, therefore, should have refused to admit in evidence the fruits of the execution of the illegal warrant.

It will be argued by the Government that at the time of the arrest, Deyoe had probable cause to arrest.

Facing this issue squarely the only additional facts known to Deyoe between the time he procured the warrant and the time of its execution was an identical situation: the delivery of a package, contents unknown, from Hall to appellant through the medium of an unidentified white man.

This, of course, adds nothing. The only other possible evidence was what he could have learned from his fellow officers—and there is no such testimony in the Record.

In *Bolt* v. *United States,* 2 Fed. (2) 922, 55 App. D. C.

120, this Court had occasion to pass on a similar situation and said in part:

> "The Court erred in permitting the two police officers to testify as to what was said to them by an unidentified informant, out of the presence of plaintiff in error. This was hearsay evidence and highly prejudicial.
>
> "Where, as here, a citizen has conducted himself in a peaceable and orderly manner, it is not for police officers to assume guilt, and without a warrant make an arrest and search, and seize a weapon. Since the statement of the unidentified man was inadmissible, as already found, it could not have justified the arrest, and no other circumstance even tended to afford such justification."

It is also uncontroverted that the only numbers plays made by Rattley were with the police officer Best; and that Rattley's transaction with Hall were entirely disjointed from the writing of the numbers; and that there was nothing unusual or significant about the package transferred except the personal belief and presumption of the officer that if Rattley were writing numbers for him then he must be writing them for others, the presumption that he placed them in a paper bag, the presumption that he delivered them to someone else and the presumption that Hall is that person.

Any possible information that Deyoe could have had would be hearsay and presumptuous beliefs of Officer Best.

The only manner in which the Court of Appeals establishes a relationship between petitioners and Rattley's number writing is by the seized evidence itself, which petitioners claim should have been excluded.

It will be further seen in subdivision "d" immediately hereafter that such information does not constitute probable cause.

With reference to a delivery of packages, in the case of *Gart* v. *United States*, 294 Fed. 66 (C. C. A. 8th) the de-

fendant was charged with a sale of narcotic drugs. The evidence tended to show a delivery of the package on the street. The Trial Court admitted evidence that at another time and place the defendant delivered a package on the street to another person, the contents of this package not being shown. On appeal, it was held to be error. This question presented the sole ground of appeal, and the Court presented an excellent review of the authorities.

The evidence was clear and uncontroverted that the officer was possessed of no facts showing probable cause and that the arrest of the appellant was clearly in violation of the Fourth Amendment.

(d).

The Warrant of Arrest Was Illegally Issued and Invalid.

The Government did not deny this in the Court of Appeals.

There was not a single statement of fact therein contained to show probable cause.

The Court of Appeals passed upon the sufficiency of such affidavits in *Schencks* v. *United States,* 2 Fed. (2) 185, 55 App. D. C. 84, wherein it stated in part:

> "If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first-hand information as to material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts and conditions."
>
> "*The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations which literally comply with the terms of the statute, but which fail to establish probable cause, inasmuch as they state the*

facts on information and belief or state conclusions of fact or of law instead of positively alleging the material facts.'' (*Citations.*) (*Italics supplied.*)

"We must hold therefore, that affidavits or depositions . . . which go no further than to allege conclusions of law or of fact . . . are insufficient to support a search warrant, and any search warrant issued on such affidavits or depositions is invalid. (Citations.)

"as the search warrant was illegally issued, the articles and things seized thereunder were taken in violation of defendant's Constitutional rights, and the admission of them over objection as evidence against her was error."

In *United States* v. *Gokey,* 32 Fed. (2) 793 (D. C., N. Y.), it was held that under the Fourth Amendment:

". . . the commission of a crime must be shown by facts positively stated before a commissioner has jurisdiction to issue a warrant of arrest. . . . The 'oath or affirmation' required is of facts, not opinions or conclusions. . . . A Complaint not based upon the complainant's personal knowledge and unsupported by other proof, confers no jurisdiction upon the Commissioner to issue a warrant.

"In this case there is not any claim that the immigration officer, who made the complaint, had any personal knowledge of the commission of the crime charged, or any other crime. . . . This lack of personal knowledge was admitted at the hearing. The Complaint therefore becomes nothing more than a statement of the commission of a crime, based upon heresay. Although made upon the positive oath of complainant, it is in reality a complaint based upon information and belief and no more. The positive averments of an official as to facts not within his personal knowledge may be enough to protect a Commissioner, but they should not be sufficient to confer jurisdiction, in violataion of the Constitution and the numerous decisions of the Courts. The complaint must, therefore, be held insufficient."

It is therefore respectfully submitted that the affidavit herein stated no facts whatsoever to show probable cause, only literally complied with the terms of the statute by setting forth conclusions of law, not based upon personal knowledge, and, therefore, the warrant was illegally issued.

2. *The past policy of the Court was to permit an attack on the warrant without the filing of a motion to suppress.* (R. 102)

In *Bennett, et. al.* v. *United States, supra,* the Court of Appeals held that where it was the established practice of the Trial Court not to hear Motions to Suppress prior to trial a failure to file such motion did not preclude the defendant from raising the issue at the trial where no such motion was filed.

Such holding by that Court is unquestionably sound.

The Trial Court herein frankly stated that prior to the Bennett case its custom was to permit counsel to either file a motion to suppress or object to the evidence as they in their discretion may determine. (R. 102)

It is therefore respectfully submitted that the Court erred in changing its policy at a time when the appellant could do nothing about it.

In the Bennett case the Trial Court refused to grant an opportunity before trial expressly; in the instant case the Trial Court changed its custom at the trial, and thereupon provided no opportunity to raise the issue in advance of trial.

Upon this question of law of procedure, there is a varied practice among the Trial Justices in the District Court. Appellant therefore respectfully states that the same rule on the exception should be applied to him as in the Bennett case.

It is therefore respectfully submitted that the Court should have passed upon the invalidity of the arrest, the invalidity of the search and seizure and should have sustained appellant's objection to the admission in evidence of the things so seized.

B.

The United States Court of Appeals for the District of Columbia erred in deciding that a trial court may at the request of the Government allow more peremptory challenges than permitted by statute on the theory that a defendant is not prejudiced if the jury as finally constituted is fair and impartial; further error being the release of six jurors for cause.

The statute involved is found in Title 6, Section 366 D. C. Code (1929) and allows each side ten peremptory challenges.

At the request of the Government (R. 25) the Court inquired "Has any member of the panel as now seated in the box played the so-called numbers game within two years of this date?" Six jurors who answered in the affirmative were summarily excused for cause.

The Court made no effort whatsoever to determine whether or not these jurors could render a fair and impartial verdict based solely on the evidence.

The Court of Appeals affirming this act held:

> "—Appellants do not complain of the fairness of the jury as impanelled, and all that they are entitled to is a trial by an impartial jury. Moreover we think it was well within the judicial discretion of the judge to excuse prospective jurors on the ground stated, and it makes no difference whether the release was for cause or favor."

It is respectfully urged that the Court of Appeals erred in making a basic principle all embracive.

This Honorable Court in pertinent language has held that where negroes were excluded from a panel trying a colored man there was a violation of his legal rights without regard to the jury as constituted. (*Norris* v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 and *Strauder* v. *West Virginia*, 100 U. S. 303).

The Government exercised eight additional peremptory challenges, which when added to the six, totalled fourteen and was in excess of that allowed by the statute.

The only reason such jurors were excused was because of a presumed prejudice or opinion relative to the "numbers" law.

This doctrine has been specifically rejected by the Courts. Petitioners respectfully present several such adjudications.

> "Parties have a right to be tried by an impartial jury. This does not mean that they have a right to have jurors who have no prejudices or no opinions as to the policy of enforcing the laws."

United States v. *Noelke*, 1 Fed. 426, 434 (C. C. S. D. N. Y.)

This case was followed in *United States* v. *Borger*, 7 Fed. 193 (C. C. S. D. N. Y.) where a defendant was charged with operating a lottery. A juror asserted his prejudice against the business to such extent that he would give the defendant's testimony less weight than a prosecuting witness' testimony if a question of veracity should arise. But otherwise he felt he could render a fair verdict on the evidence. From a denial of a challenge for cause, the defendant appealed. It was affirmed on the ground that such prejudice was one against the crime and as such does not affect the sufficiency of a juror.

In *Ungerleider* v. *United States*, 5 Fed. (2) 604 (C. C. A. 4th) the Court held that persons contributing to Anti-Saloon League were not disqualified as jurors in a prosecution for conspiring to violate the National Prohibition Act; where each of them stated that he could and would give as fair consideration to such a case as to one charged with breach of any other statute. (Italics supplied.)

In *Beatty* v. *United States*, 27 Fed. (2) 323 (C. C. A. 6th) the Court said:

> "A question may be asked if any of the jury were members of organizations engaged in suppression of

> the particular crime for which the defendant is charged; but such membership, if it does not apply to the instant case, is no ground for challenge for cause but only to serve the defendant as a basis for the exercise of his peremptory challenges." Citing *Remus* v. *United States,* 291 Fed. 501.

To the same effect is *Corley* v. *State,* 162 Ark. 178, 257 S. W. 751, Arkansas.

The point was succinctly stated by the Court in *Page* v. *State,* 115 Tex. Cr. R. 605, 27 S. W. (2) 219 wherein it said:

> "It (a written statement) is sufficient to show a bias of the juror in favor of the prohibition law and a prejudice against liquor law violators. This is not sufficient to disqualify the juror, where the juror, as in this case, answered that he had no prejudice against the defendant, nor against people charged with violation of the liquor law, nor any opinion that would affect his verdict."

In *State* v. *Swain,* 180 La. 20, 156 So. 162 the Court said:

> "Juror is considered 'impartial' when he is neither biased in favor nor prejudiced against accused, when he has not formed or expressed an opinion as to the guilt or innocence of accused, and when he entertains no conscientious scruples which would prevent his carrying the law into effect."

And as to the presumptions applied to jurors, in *State* v. *Dean,* 274 N. W. 817, 65 S. Dak. 433 the Court stated:

> "The fact that these jurors stated, upon examination by counsel for appellant, that they had a personal prejudice against the use of a gun in defense against a physical assault by one unarmed would not refute the presumption of their honesty in stating that they would consider the facts of the case impartially according to the instructions on the law as given by the Court."

Again in *Elkins* v. *State*, 233 Pac. 491, (Okla.), Feb. 14, 1925, the Court stated:

> "A mere partial opinion or impression does not disqualify him if it be apparent that such partial opinion or impression will not influence the juror in finding a verdict.
> "On juror's voire dire examination, Court should resolve all doubts as to competency of juror in favor of accused."

In *Garvey* v. *Michaud*, 184 At. 712 (Vermont), (May 5, 1936), the Court held:

> "The competency of a juror will be presumed until the contrary is shown; and the burden is upon the challenging party to establish the disqualification of the juror."

In further support of the foregoing propositions of law appellant submits the following:

Kelly v. *City Council of City of Evanston*, 1 A. (2d) 185 R. I. (August 5, 1938).
Shaddix v. *State*, 90 Tex. Cr. R. 431, 235 S. W. 602.
Moore v. *City of Wichita*, 189 P. 372, 106 Kans. 636.

Appellant respectfully submits that the Trial Court erred in summarily excusing for cause upon Government challenge the said six jurors upon the possible presumption as to that prejudices or opinions relative to the crime itself without any effort whatsoever to determine their partiality or lack thereof.

This contention, as a principle of law, is set forth in *Searle* v. *Roman Catholic Bishop*, 203 Mass. 493, 89 N. E. 809, wherein it was held that a ruling by which all persons of a certain religious faith are excluded from the panel at the plaintiff's request renders his right of peremptory challenge relatively more valuable, and the defendant's similar

right relatively less valuable for the defendant is prejudiced by such an error, since no error which effects a party's right of peremptory challenge can be considered harmless.

It is therefore respectfully submitted that the United States Court of Appeals erred in not giving proper effect to both the statute and the law when it summarily excused at the request of the Government the six jurors for cause.

C.

The United States Court of Appeals for the District of Columbia erred in not deciding that it was reversible error to permit an attack on the character, reputation and habits of a defendant prior to his putting the same in issue.

The Government attempted to explain the presence of an Alcohol Tax Unit Inspector and asked the witness why he was there. The witness responded it was because they were using a car assigned to him. And then stated further the police needed a fast car because they knew, by reputation, that the defendant was a fast driver. (R. 88)

It is a fundamental principle of law that unless the accused has introduced evidence of good character, the prosecution cannot introduce evidence of his bad character and habits as part of its case. (*Gordon* v. *United States,* 254 Fed. 53.)

In a prosecution for murder, evidence of the Government that defendant's reputation for peace and quiet and for taking liquor was bad was prejudicial and reversible. (*Shorter* v. *Commonwealth,* 252 Ky. 472.)

In *Fish* v. *United States,* 215 Fed. 544, 551 (C. C. A. 1st), it was held that evidence of the defendant's propensity to commit crime was inadmissible.

In *Hazleton* v. *United States,* 293 Fed. 384 (C. C. A. 9th), there was a liquor prosecution. The Court admitted evidence by the police officer that he had arrested the de-

fendant, charged here with disorderly conduct for which she was convicted.

On appeal this was held to be prejudicial, the Court stating:

> ". . . but it was very prejudicial to allow the prosecution, as part of its case in chief, to introduce evidence of a plea of guilty of an apparently collateral offense. The evidence was not admissible as affording a legal inference of guilt of the crime for which defendant was being tried, and clearly its effect must have been to impress the minds of the jurors with the belief *that the defendant was a woman of bad tendencies and unworthy.* (Italics supplied.)
>
> "For the reason, therefore, that the reception of the evidence conflicted with the firmly rooted rule that the prosecution may not initially assail defendant's character, the judgment must be reversed. . . ."

To like effect is *State* v. *Levitt,* 278 Mo. 372, 213 S. W. 1008.

Appellant respectfully submits that the question of fast driving of an automobile was no issue in this case. The evidence reveals that defendant had stopped at a stop sign when arrested.

The implications of such statement are prejudicial. The Court made no effort to explain it to the jury but merely overruled appellant's motion.

Fast driving would imply reckless driving. Reckless driving is a crime and its severity stressed by this Court in *Colts* v. *District of Columbia,* 282 U. S. 63, 51 S. Ct. 52, 75 L. Ed. 177, which was an appeal from the United States Court of Appeals for the District of Columbia. (38 Fed. (2) 535, 59 App. D. C. 224.)

It put in issue appellant's reputation and habits. It tended to import a propensity to violate the speed and reckless driving laws. It tended to show he was a man of bad tendencies. (*Hazleton* v. *United States, supra*).

This, the courts have stated, cannot be done.

It is respectfully submitted that the Court erred in admitting evidence assailing the reputation and character of the accused.

D.

The United States Court of Appeals for the District of Columbia erred in misconstruing petitioners' objection to the trial court's charge to the jury and in not deciding that the trial court charged the jury erroneously and prejudicially on the question of petitioners' failure to testify.

1. The Court instructed the jury as follows:

> "Now, the defendants have not testified in this case. That is entirely their right under the Constitution. A person may testify or not, as he pleases, in a criminal case. If he does not testify, you must not draw any presumption or unfavorable inference against him or her because he has merely availed himself of his Constitutional right." (R. 117)

That is not the law.

This Court in *Bruno* v. *United States*, decided December 4, 1939, reported in Volume 60, No. 3, advance sheets of the S. Ct. Reporter at page 198, 200 recited the law to be as follows:

> "That Act (28 U. S. C. A. Sec. 632) freed the accused in a federal prosecution from his common law disability as a witness. But Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him."

The Court conveyed to the minds of the jury that in refusing to testify, appellant was hiding behind a Constitutional right. That was not true.

It was presented to the jury in an incorrect and prejudicial manner and was therefore erroneous.

2. The evidence of the Government was offered to prove that appellant was in possession of certain writings which were used in the numbers game. There was no issue cre-

ated as to the possession of these writings nor any issue or evidence tending to explain the possession thereof.

Appellant did not take the stand.

Nevertheless the Court on three occasions instructed as follows:

> (R. 123.) ". . . Of course, if you believe that a satisfactory explanation has been made showing innocent possession of these records, or writings, then that would overcome the *prima facie* case made by the possession. It is not necessary that the explanation be contained in evidence offered by the defendants themselves; it is enough if it appears in the evidence which is offered in the case, on behalf of anybody."
>
> (R. 124.) ". . ., that is to say, the jury may presume from such possession if unexplained or unsatisfactorily explained that the possessor was concerned. . . ."
>
> (R. 124.) "As I say, that is only *prima facie* evidence, and if it is satisfactorily explained, then it would not be *prima facie* evidence."

And again on page 131 of the Record the Court stated:

> "It is a matter of common experience that if two or more people agree to violate the law, usually they do not reduce that agreement to writing; so ordinarily you do not have some member of the conspiracy called to the stand to tell you about it."

It is respectfully urged that the foregoing instructions were not based upon the evidence, unnecessarily and erroneously reflected upon the failure of appellant to testify, and in addition to its instruction on the subject, prejudiced the rights of appellant.

3. Nowhere is the issue raised that petitioners' counsel contended that the Trial Court erred in charging the jury without their request that the jury should draw no unfavorable inferences from petitioners failure to testify.

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the United States Courts of Appeals for the District of Columbia to review its decision made herein.

MYRON G. EHRLICH,
CHARLES E. FORD,
JAMES K. HUGHES,
Counsel for Petitioners.

APPENDIX A.

Note:

The following are the relevant parts of the statutes in this petition, i.e., Title 6, Section 366, Title 6, Sections 151 and 151A of the Code of Laws of the District of Columbia:

Act of March 3, 1901, 31 Stat. 1338 c. 854, sec. 918; June 30, 1902, 32 Stat. 536, c. 1329. (Title 6, Section 366):

"In all trials for capital offenses the accused and the United States shall each be entitled to twenty peremptory challenges. In trials for offenses punishable by imprisonment in the penitentiary the accused and the United States shall each be entitled to ten peremptory challenges. In all other cases, civil as well as criminal, in which the plaintiff is the United States or the District of Columbia, each party shall be entitled to three peremptory challenges; and if there are several defendants, they shall be treated as one person in the allowance of such challenges."

Act of April 5, 1938, C. 72, 52 Stat. 198, Title 6, Section 151, Code of Laws of the District of Columbia:

"If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly, or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible, or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to any chance of drawing or obtaining a prize, to be drawn in any lottery, or in a game or device known as policy lottery or policy or shall for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such

chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery."

Act of April 5, 1938, C. 72, 52 Stat. 198, Title 6, Section 151A of the Code of Laws of the District of Columbia:

"If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill slip, token, paper, writing, or other device used, or to be used, or adopted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 160

RICHARD SMITH AND GERALDINE J. HALL,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the Court of Appeals (R. 137–141) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 18, 1940 (R. 141). The petition for writ of certiorari was filed June 17, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting as evidence certain lottery papers alleged to have been illegally obtained from the person and automobile of the petitioner Smith at the time of his arrest.

2. Whether it was reversible error to excuse from the jury panel six persons who admitted that they had played the numbers game, petitioners being charged with violations of the lottery laws of the District of Columbia.

3. Whether the admission in evidence of a statement by a Government witness that petitioner Smith was known as a "fast driver" constituted prejudicial error.

4. Whether reversible error resulted from certain instructions to the jury.

STATUTES INVOLVED

The pertinent statutory provisions appear in the Appendix to the brief in support of the petition for writ of certiorari (pp. 32–33).

STATEMENT

Petitioners were convicted upon counts 9, 10, 11 and 12 of an indictment charging violations of the lottery laws of the District of Columbia and conspiracy to violate those laws (R. 9–15). The petitioner Smith was sentenced to imprisonment for a period of six months to two years on each of counts 9 and 10, six months on count 11, and four months to two years on count 12, the sentences

to run concurrently (R. 15–16). The petitioner Hall was sentenced to imprisonment for a period of four to ten months on each of counts 9 and 10, four months on count 11, and four to ten months on count 12, the sentences to run concurrently (R. 16). On appeal to the Court of Appeals for the District of Columbia petitioners' judgments of conviction were unanimously affirmed (R. 137–141).

The evidence establishing the guilt of the petitioners and the circumstances surrounding the arrest of the petitioner Smith and the seizure of certain lottery papers found on his person and in his automobile at that time, is sufficiently summarized in the opinion of the Court of Appeals (R. 138–139).

ARGUMENT

I

As a basis for urging the exclusion as evidence of certain lottery papers seized by police officers from the possession of the petitioner Smith at the time of his arrest, his counsel at the trial moved to quash the warrant of arrest on the ground that it was issued without probable cause (R. 61–63), but action on this motion was held in abeyance (R. 64). No motion to suppress the evidence had been made prior to trial. At the conclusion of the defendants' case the motion to quash was renewed (R. 96–102), but the trial court overruled it upon the authority of the recent decision of the Court of

Appeals for the District of Columbia in *Bennett* v. *United States,* 104 F. (2d) 209 (R. 102–105).[1] In that case it was held that an objection to evidence alleged to have been illegally seized comes too late when first made during the course of a criminal trial, if there has been an opportunity to present the matter prior to trial.

This is but a recognition of the principle applied by this Court in *Segurola* v. *United States,* 275 U. S. 106, 111–112, which principle, the Court stated, was first laid down by it in *Adams* v. *New York,* 192 U. S. 585, and reiterated by it in subsequent decisions. See also *Nardone* v. *United States,* 308 U. S. 338, 342. The *ratio decidendi* of these decisions is that a court should not pause in the course of a criminal trial to determine collateral issues as to how the evidence was obtained.

It is contended, however, in reliance upon *Gouled* v. *United States,* 255 U. S. 298, and *Agnello* v. *United States,* 269 U. S. 20, that this principle does not apply where the uncontroverted evidence discloses a search and seizure in violation of the Fourth Amendment (Br. 12–17). And it is asserted (Br. 17–22) that the undisputed evidence in the instant case established that there was no probable cause for the issuance of the warrant of arrest for petitioner Smith and that there were not suffi-

[1] The record does not disclose that any exception was taken to the overruling of this motion. Since, however, the action of the trial judge was reviewed by the Court of Appeals (R. 139), we have discussed it here.

cient facts and information in the possession of the arresting officers to justify their arrest of petitioner Smith without a warrant.[2]

We submit that neither the *Gouled* case nor the *Agnello* case presents a comparable situation. In the *Gouled* case, which was before this Court upon certificate, there had been a motion before trial for the return of the seized papers, and the certificate disclosed that it had become apparent during the course of the trial that the papers had been unconstitutionally seized.

In the *Agnello* case it was undisputed that a defendant against whom the Government sought to introduce a certain can of cocaine did not know of the search of his premises and the seizure of the cocaine until the Government sought to introduce it at the trial. Also, it appeared from facts not in controversy that the search and seizure were in violation of the Fourth Amendment.

In the instant case, however, the lottery papers were seized from the person and automobile of the petitioner Smith at the time of his arrest, long prior to the trial (R. 67–68, 72); accordingly, it cannot be said that he was not aware of the search and

[2] It is not at all clear from the petition for writ of certiorari and supporting brief whether this question is being urged on behalf of both petitioners or merely on behalf of the petitioner Smith. Since only his constitutional rights were transgressed if the search and seizure were invalid, it would seem that the petitioner Hall is not in a position to urge the question. See *Agnello* v. *United States*, 269 U. S. 20, 30, *supra*.

seizure until the Government sought to introduce the lottery papers at the trial.

Nor can it properly be argued that the undisputed facts showed that the search and seizure were in violation of the Fourth Amendment. In view of the ruling of the trial court that the issue should have been raised in advance of trial by a motion to suppress (R. 102–105), the question was but meagerly explored. From what is contained in the record it is evident that there was a dispute as to whether the officer who obtained the warrant of arrest made an affidavit before the United States Commissioner in addition to that upon which the petitioners rely (R. 56–57, 98). Also, as is apparent from the summary of the testimony contained in the opinion of the Court of Appeals (R. 138–139), it cannot be said that the undisputed facts disclose that the arresting officers lacked sufficient facts and information to justify their arrest of petitioner Smith without a warrant. Indeed, the trial judge, upon the basis of the evidence before him, stated that, "I am not clear that the warrant is not valid as it stands" and that "I am inclined to think, also, that the officers had sufficient knowledge to arrest" petitioner Smith without a warrant (R. 105).

In reliance upon the decision of the Court of Appeals upon petition for rehearing in *Bennett* v. *United States,* 104 F. (2d) 209, it is contended (Br. 22) that permission should have been granted

at the trial to raise the question of the legality of the search and seizure, even though no motion to suppress was made in advance of trial. In the *Bennett* case it was conceded by the Government (apparently in response to the petition for rehearing) that the defendant who sought to challenge the admissibility of the evidence there in controversy had been precluded by the established practice of the trial judge from raising the question before trial. In the instant case, however, the trial court made it clear that if a motion to suppress had been filed before trial it would have heard it (R. 102, 104).

It is true, as the petitioners assert, that the trial judge in the instant case, in view of the original decision in the *Bennett* case,[3] abandoned his former practice of permitting the filing of motions to suppress evidence to be delayed until the trial, but this abandonment had been foreshadowed when the *Bennett* decision was rendered on February 27, 1939, three months in advance of the trial in the present case. There was, consequently, ample opportunity prior to the trial of the instant case to present a motion to suppress the evidence in question.

Since all of the trial judges in the District presumably conformed their practice to the ruling of the Court of Appeals in the *Bennett* case, it cannot matter that some of the trial judges may have

[3] See p. 4, *supra*.

theretofore followed a practice which varied from that of the judge who presided at the trial of the instant case, as petitioner would seem to infer (Br. 22). In any event, the burden is upon him who seeks at the trial to attack the legality of a search and seizure to establish that he has been denied an opportunity to present the question in advance of trial, and there has been, we submit, no such showing made in the instant case.

II

In the examination of the prospective jurors the trial judge, at the request of the Government, inquired whether any of them had played the so-called numbers game within the past two years. Six of the prospective jurors answered in the affirmative and were excused for cause (R. 25). Petitioners contend, in effect, that this action of the trial court constituted prejudicial error because it resulted in the Government being permitted to exercise more peremptory challenges than is allowed by statute.

The record does not disclose that any exception was taken by the petitioners. But, aside from this, we submit that there is no merit in their contention. The petitioners do not assert that the jury finally selected was prejudiced against them or did not try the issues fairly. The right of a defendant, in the selection of the trial jury, is to secure the rejection of those who are apparently prejudiced against him, not to obtain a jury preju-

diced in his behalf. *Kloss* v. *United States,* 77 F. (2d) 462, 463 (C. C. A. 8th). All that a defendant is entitled to is a duly qualified and impartial jury. *Crawford* v. *United States,* 212 U. S. 183, 196. In the selection of the jury the trial judge has, of course, a wide discretion. *Reynolds* v. *United States,* 98 U. S. 145; *Fall* v. *United States,* 49 F. (2d) 506 (App. D. C.), certiorari denied, 283 U. S. 867. The petitioners having had a fair trial by an impartial jury, their legal rights were protected and the exclusion from the jury of persons who had previously played the numbers game could not in any wise have prejudiced them. See *Ruthenberg* v. *United States,* 245 U. S. 480.

Since violations of the lottery laws were the offenses involved, the Court of Appeals was clearly correct in stating that "it was well within the judicial discretion of the judge to excuse prospective jurors on the ground stated" (R. 139).

The cases relied upon by the petitioners deal largely with the acceptance of jurors over a defendant's challenge for cause, and, consequently, are not in point. Those cases which they cite relating to the impact of the equal-protection clause upon the exclusion by state authorities of negroes from jury panels obviously present no analogy. Here, the prospective jurors were excluded for *cause.*

III

It is next contended (Br. 27–28) that reversible error resulted because one of the police officers

who arrested the petitioner Smith was, on redirect examination by the Government, permitted to state that the reason an automobile assigned to one Sweeney, an Alcohol Tax Unit investigator, was used in following Smith was because that automobile was in a little better shape than the one the police officers had and because "we knew, by reputation, that the defendant Smith was a right fast driver" (R. 88). It is argued that fast driving implies reckless driving, which is a crime, and hence that the Government was improperly permitted to attack the character, reputation, and habits of the petitioner Smith prior to his putting the same in issue.

The mere statement of the contention discloses its lack of merit. Aside from the fact that fast driving does not necessarily imply reckless driving, clearly the answer of the witness was not intended to impute to the petitioner Smith a bad reputation or character. The record discloses that the prosecutor was seeking merely to show that Sweeney, although an Alcohol Tax Unit investigator, was present at Smith's arrest solely because his automobile was being used by the officers. The court below, we submit, properly included the above contention among those which it declined to discuss as being "without merit" (R. 141).

IV

(a). In charging the jury, the trial court stated (R. 117):

> Now, the defendants have not testified in this case. That is entirely their right, under the Constitution. A person may testify or not, as he pleases, in a criminal case. If he does not testify, you must not draw any presumption or unfavorable inference against him or her because he has merely availed himself of his Constitutional right.

Petitioners contend (Br. 29) that prejudicial error resulted because this instruction conveyed to the minds of the jury that the petitioners, in not testifying, were hiding behind a Constitutional right, whereas their privilege not to take the stand was a statutory one.

The contention is, we submit, too trivial to require argument. Moreover, it should be pointed out that no specific objection or exception was taken to the instruction by the petitioners (R. 113, 135). Nor did they assign the giving of it as error (R. 18–20).

(b). The petitioners also assert (Br. 29–30) that they were prejudiced by certain other instructions of the trial court with reference to the unexplained possession of lottery papers and slips (R. 123–124). Their contention is, in effect, that these instructions reflected upon their failure to testify. It is apparent from the summary of the evidence contained in the opinion below (R. 138–139) that the jury was justified in concluding that the lottery papers and slips found in the possession of petitioner Smith at the time of his arrest had also previously been in

the possession of the petitioner Hall. The instructions were consequently required by the provision of the lottery statutes to the effect that the possession of lottery papers shall be *prima facie* evidence of certain offenses under that statute (Appendix to petitioners' brief, pp. 32–33), offenses which were charged in the indictment (R. 6–15). The instructions contain nothing which in any way called the jury's attention to the fact that the petitioner had not taken the stand. Indeed, as the court below said, "A full reading of the court's charge shows that it was even more favorable to all the accused than they had a right to demand" (R. 141). Furthermore, here again the petitioners neither objected nor excepted to the instructions in question, nor did they assign the giving of them as error.

CONCLUSION

The petition presents no question requiring review by this Court, and we therefore respectfully submit that it should be denied.

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